Before the
Federal Communications Commission
Washington, D.C. 20554

National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing	)))))	CG Docket No. 04-208
In the Matter of Truth-in-Billing and Billing Format	)))	CC Docket No. 98-170

COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

The Ohio Commission recommends that the FCC act to guarantee application of the common sense steps adopted in the Truth-in-Billing Order to ensure that consumers are provided with the truthful information needed to make informed choices in the telecommunications marketplace. The requirements of the Truth-in-Billing Order are intended to ensure that charges on telephone bills have a description that is brief, clear, non-misleading and specific enough so that customers can assess whether the services they requested correspond to those they received. As a result of language included in the Universal Service Contribution Order in 2002, telecommunications providers have been including surcharges on bills with a description and in a location on the bill suggesting that the charges are government-related assessments. This practice allows carriers to disguise company-specific costs as apparent government charges, confusing customers leaving them with a misunderstanding of their bill and their competitive choices.

On March 30, 2004, the National Association of State Utility Consumer Advocates (NASUCA) filed a petition for a declaratory ruling (NASUCA Petition) prohibiting telecommunications carriers from imposing monthly line item charges on customers' bills unless such charges have been expressly mandated by a regulatory agency. On May 25, 2004, the Federal Communications Commission (FCC) issued a public notice inviting public input regarding the NASUCA petition. The Public Utilities Commission of Ohio (Ohio Commission) agrees that there appears to be an abuse of the line item charges on consumer bills as highlighted by the NASUCA petition.

The Ohio Commission supports the NASUCA petition. But should the FCC have concerns that the NASUCA proposal could be an unconstitutional infringement on the carrier's First Amendment right of free speech, the Ohio Commission offers an alternative solution as a compromise between the NASUCA surcharge prohibition and the current practice of questionable labeling of charges by telecommunications providers. Surcharges that are not expressly authorized by regulatory or government entities should be labeled and described specifically to reflect the charges they reflect. Telecommunications providers should be required to disclose government mandated charges by grouping the taxes and surcharges expressly authorized by regulatory and government agencies under a section of the bill identified as "Government Sanctioned Charges." This section should be located separate, distinct, and apart from all other charges. Full disclosure of the description on the bill of non-government sanctioned charges and a separate, conspicuous location on the bill for the charges that are expressly authorized by the government will assist consumers in making informed choices, while addressing concerns relative to infringing on commercial speech and the development of the market.

BACKGROUND

Truth-in-Billing

The purpose of the Truth-in-Billing Order was to ensure that consumers receive "thorough, accurate, and understandable bills" from their telecommunications carriers.[1] The FCC noted it was taking common-sense steps to ensure that consumers are provided with the basic information they need to make informed choices in a competitive telecommunications marketplace. The FCC recognized that "consumers may be less likely to engage in comparative shopping among service providers if they are led erroneously to believe that certain rates or charges are federally mandated amounts from which individual carriers may not deviate".[2] The Truth-in-Billing Order resulted in requirements adopted as Title 47 Section 64.2401 of Code of Federal Regulations.

The truth-in-billing code provision is divided into requirements for bill organization, descriptions of billed charges, deniable and non-deniable charges and the disclosure of contacts for consumer inquiries. Each area is important but most germane to the present issue is the language in subpart (b) of 47 CFR 64.2401, concerning the charge descriptions.

> **(b) Description of billed charges.** Charges contained on telephone bills *must be accompanied by a brief, clear, non-misleading, plain language description of the service or*

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[1] *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further notice of Proposed Rulemaking, FCC 99-72 (rel. May 11, 1999) at paragraph 5. ("Truth-in-Billing Order").

[2] Truth-in-Billing Order, at paragraph 49.

> *services rendered.* The description must be sufficiently *clear in presentation* and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged.

Subpart (b) requires that charges be clear and non-misleading. The code provision also requires the bill to be clearly organized and the description of charges sufficiently clear in presentation and specific in content. In order to achieve this goal the FCC directed that telephone bills must be clearly organized and include information clearly identifying the service provider associated with each charge. The requirements are present to ensure consumers can determine whether the services they are billed for are the ones they have requested and received. NASUCA accurately pointed out in its petition that there is a departure from these truth-in-billing principles in the current billing practices of some telecommunications providers.

NASUCA Petition

The March 30, 2004, NASUCA petition highlighted the apparent catalyst that started carriers utilizing line item charges to mask company specific costs.[3] The December 2002, *Contribution Order* prohibited carriers from marking-up federal universal service fund charges to customers above the FCC approved assessment. The FCC was concerned that the flexibility provided in allowing companies to recover federal universal service costs in end-user line item charges enabled some companies to include

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[3] NASUCA Petition at 8-9.

other unrelated costs.[4] The effort by the FCC was intended to alleviate end-user confusion caused by the surcharges, address over recovery of costs and foster a more competitive environment.[5] This attempt to protect consumers and facilitate competition instead resulted in further complicating customer confusion. While clarifying the unacceptable abuse of the USF end-user line charge, the FCC opened the door for companies to shift the costs associated with the business of providing telecommunications service to "customer rates *or other line item charges*" (*emphasis added*).[6]

NASUCA states that the line-item surcharges have since been placed on customer bills typically as some type of "regulatory compliance" charge while at the same time reducing usage-based rates.[7] NASUCA provides a number of examples, such as AT&T's Regulatory Assessment Fee, MCI and Sprint's Carrier Cost Recovery Charge to recover regulatory costs, Bell South's Carrier Cost Recovery Fee as well as a number of others.[8] NASUCA states that, with the sheer number of carriers offering service, it would be administratively impossible to look at each carrier's fees and that the only option to protect consumers is to "prohibit all line-items, surcharges and fees unless both recovery of the fee, and the amount of the fee carriers are entitled to assess, is expressly mandated by federal, state or local government".[9]

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4 *In the Matter of Federal State Joint Board on Universal Service,* Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (rel. Dec. 13, 2002) ("Contribution Order").

5 *Id*. at paragraph 48, 50.

6 *Id*. at paragraph 40, 54.

7 NASUCA Petition at 10.

8 *Id*. at 12-23.

9 *Id*. at 24.

Banning Versus Requiring Disclosures in Commercial Speech

The NASUCA petition proposes a ban on line item charges not mandated by government agencies. The Ohio Commission concurs with NASUCA that this can be ordered by the FCC since the content and placement of items on the actual consumer bill is properly considered conduct and not commercial speech. Carriers, however, will likely argue that prohibiting surcharges is an unconstitutional infringement on the carrier's First Amendment right of free speech. Recognizing this possibility, the Ohio Commission offers an alternative solution involving disclosure of certain truthful information on consumer bills.

Should the FCC decide to regulate the information as commercial speech instead of conduct, against the preference of the Ohio Commission and NASUCA, then the threshold question centers on whether the government action is banning the speech, or merely requiring certain disclosures. The United States Supreme Court consistently strikes down government regulations banning different types of commercial speech.[10] Requiring disclosures of commercial speech to serve a government interest tends to withstand the legal scrutiny properly reviewed when contemplating regulation of commercial speech.[11] Government efforts to require disclosures of commercial speech are more successful than efforts to ban such speech.

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10 *Greater New Orleans Broadcasting Assoc. v. U.S., 527 U.S. 173, 119 S Ct. 1923 (1999)*; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585 (1995); *Liquormart v. Rhode Island Liquor Stores Assoc.*, 517 U.S. 484, 116 S.Ct. 1495 (1996); *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792 (1993); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505 (1993); *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

11 *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265 (1985).

The universally accepted test to determine whether a government regulation banning commercial speech is legally permissible is the test outlined in *Central Hudson Gas & Electric v. Public Service Commission of New York*.[12] The *Central Hudson* test is a four part analysis that focuses first on the classification of the speech sought to be banned and then on the regulation attempting to ban the commercial speech. The Court first determines if the speech concerns a lawful activity and is not misleading or fraudulent. Then the Court weighs whether the regulation serves a substantial government interest, directly advances the asserted interest, and is narrowly tailored to serve the substantial interest. A regulation passing Court review applying the *Central Hudson* test has proven difficult.[13]

Disclosures, however, have proven a viable option for government action regulating commercial speech. The landmark case authorizing disclosure of speech as a means to regulate commercial speech is the Court's decision in *Zauderer v. Office of Disciplinary Counsel*.[14] In *Zauderer,* the Court held that the disclosure requirement that an attorney disclose in advertisements that clients will be required to pay costs in cases the attorney accepts on a contingency fee basis. The decision points out that the disclosure requirement only required that more information be provided than they might otherwise be inclined to present.[15] The Court went on to point out that it has repeatedly emphasized that because disclosure requirements trench much more narrowly on an

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12 *Central Hudson,* 447 U.S. 557 (1980).

13 The Ohio Commission takes no position on whether a ban on commercial speech in this particular case would be invalidated. It is the position of the Ohio Commission that requiring truthful disclosures is simply a less intrusive and more easily defended strategy for regulating commercial speech.

14 *Zauderer,* 471 U.S. 626 (1985).

15 *Id*., at 650, 105 S.Ct. at 2281.

advertiser's interests than do flat prohibitions on speech that warnings and disclaimers are appropriate in order to dissipate the possibility of consumer confusion or deception.[16] Disclosure of truthful speech is viewed as a more narrowly tailored manner of regulating commercial speech.

OHIO COMMISSION PROPOSAL

Billing Disclosures

Under the Ohio Commission's alternative solution, telecommunications providers would be required to disclose line-item charges in an appropriate place on the bill and with adequate descriptions. The Ohio Commission would prefer that all non-sanctioned charges be included in the companies' standard offer to customers. But if the FCC does not agree, the Ohio Commission urges that line-item descriptions for non-government sactioned charges at least be specific enough that consumers have notice that the charges are not government mandated and further urges that those charges be included in a separate area of the bill distinct and separate from the "Government Sanctioned Charges". We recommend that the non-sanctioned charges section of the bill carry the following disclosure:

> *These surcharges are charges imposed by the company to recover other costs of doing business and are not required by government.*

The need for clarification of the description of surcharges is due to the risk that consumers are being misled and not able to identify that the surcharges are company

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16 *Id*. at 651, 105 S.Ct. at 2282; citing *In re R.M.J*., 455 U.S. 191, 201, 102 S.Ct. 929, 936 (1982); *Central Hudson* at 565, 100 S.Ct. at 2351; *Bates v. State Bar of Arizona*, 433 U.S. 350, 384, 97 S.Ct. 2691, 2709 (1977); *Virginia Pharmacy Bd*., 425 U.S. 748, 772, n.24, 96 S.Ct. 1817, 1831, n. 24 (1976).

specific charges. The descriptions on the bills lead customers to assume that the charges are government authorized charges that cannot be avoided by switching carriers. Companies are able to lower the initial pitch for service, offering a lower competitive price while recovering that discount in a line-item surcharge described as a government assessment surcharge. This practice does not ensure that the most efficient company will prevail, and the practice acts to the detriment of developing a robust marketplace. The consumer deserves to be made aware of the surcharges recovering ordinary company costs that are not ordered by a government agency and may be avoidable by switching carriers. The FCC should clarify the intent of the language in the Contribution Order that apparently prompted the proliferation of line item charges. The clarification should reinforce the idea that those charges must clearly represent the cost being recovered to comply with the truth-in-billing requirements.

The Ohio Commission's alternative solution would require carriers to disclose government approved charges and taxes in an area of the bill conspicuously labeled with the header "Government Sanctioned Charges". The only line-item charges permitted under this header would be those in which both the recovery of the fee and the amount of the fee authorized is expressly mandated by federal, state or local government. This would help prevent the risk of misleading consumers if line-item charges are allowed. The "Government Sanctioned Charges" section should be in an area separate and distinct and after the listing of all other charges on the bill.[17] The distinction between this section and the other charges on the bill should be obvious. The truth-in-billing requirements

[17] If a bill format contains a front page summary of charges the "Government Sanctioned Charges" section should be at the end of the summary distinct from all other charges.

dictate that the bill be clearly organized and sufficiently clear.[18] The current location and description of the non-sanctioned government charges as a government assessment could mislead a consumer to believe such charge is mandated by the government. That constitutes neither a clear organization of the bill, nor a sufficiently clear description of the charge in question. This practice of grouping different company specific costs into line-item surcharges as "regulatory assessments" with government sanctioned charges should stop.

These disclosures should serve the interest of the FCC in preventing misleading billing and provide consumers with a better understanding of the charges on bills. The Ohio Commission wants to be sure that companies are not labeling ordinary expenses of doing business as government or regulatory charges. Therefore, if line-item charges are allowed, the telecommunications companies must appropriately label their charges in accordance with the truth-in-billing requirements and place them in an area that can not be confused as a tax or government mandated surcharge.

Verification of Charges

Consistent with our recommendation to reserve a separate portion of the bill for only "Government Sanctioned Charges," the Ohio Commission believes that it should be incumbent upon government to ensure the accuracy of the government sanctioned charges. Initially, at the Federal level, this could be accomplished by requiring all carriers with approved surcharges to attest to the accuracy of the charge. For example, a program could be instituted that would require an accountable officer of the company to

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[18] 47 CFR 64.2401 (West 2004).

attest to the accuracy of the charge. Carriers misrepresenting the amount of the charge and over recovering costs should be subject to the full panoply of applicable sanctions in each respective jurisdiction (*i.e.*, Federal, state, and local).

NASUCA notes that, taking into consideration the sheer number of carriers cited in its petition, it would be administratively impossible for the FCC to look at each carrier, or each carrier's fee, to determine whether the fee is sufficient and accurately described, whether customers are adequately informed of the fee, or whether the fee reasonably recovers the cost incurred by the carrier in complying with the regulatory program(s) to which the fee is attributed. In support of its position, NASUCA notes that there are approximately 1000 Interexchange Carriers (IXC) and 1300 Commercial Mobile Radio Service (CMRS) providers operating in the United States.[19]

To the extent a carrier's charge appears to be excessive or disproportionate as compared to other similarly situated carriers rendering fees for identical mandated programs, the Ohio Commission recommends that the FCC should request that carrier to provide additional supporting documentation or cost studies verifying the amount of its charge. In the long term, the FCC may find it necessary to issue an NPRM to fine-tune its verification process and to arrive at specific penalties for any misrepresentations that result in over recovery of expenses for the programs.

The Ohio Commission recommends that carriers should be allowed to recover only the direct incremental cost associated with the required regulatory program(s). More specifically, carriers' charges should not result in cash flows that exceed the

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[19] NASUCA Petition at 23-24.

incremental direct cost to meet the requirements of the program. For example, no indirect costs for marketing programs and lobbying expenses should be permitted for the implementation of local number portability. The Ohio Commission clarifies that its recommendation regarding this matter is in no way to be interpreted to suggest economic regulation of CMRS providers or IXCs. But to the extent that these charges are sanctioned by government, it should be incumbent upon government to ensure that the companies are not over recovering their costs at the expense of customers. The Ohio Commission is recommending that only charges in the newly disclosed "Government Sanctioned Charges" section of the bill would be subject to this verification. A verification requirement on clearly disclosed and delineated non-government sanctioned charges is not necessary because the market will determine their appropriateness provided the charges are clearly and accurately described as we recommend.

CONCLUSION

The Ohio Commission respectfully recommends that the FCC address the ongoing problem highlighted by the NASUCA petition. If the FCC does not adopt NASUCA's proposal, the FCC should, at a minimum, require accurate descriptions of non-government sanctioned charges and a bill organization that allows only government approved charges to be included in the "Government Sanctioned Charges" section listed separate after all other charges. This will make bills less confusing and alleviate the potential that customers are misled. Government should also recognize its responsibility in this process to ensure that the line items under the "Government Sanctioned Charges" section are valid. The Ohio Commission believes that NASUCA's proposal, or in the alternative the Ohio solution, will address the valid concerns highlighted in the NASUCA petition.

Respectfully submitted,

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